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Twenty-eighth session

SUMMARY RECORD OF THE 571st MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 18 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

CONTENTS

Electronic data interchange: draft Model Law (*continued*)

Article 11 (*continued*)

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The meeting was called to order at 9.40 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4; A/CN.9/XXVIII/CRP.6, A/CN.XXVIII/CRP.7)

Article 11 (*continued*)

1. **The CHAIRMAN** reminded participants that, with respect to article 11, paragraph (6), in the version to be found in document A/CN.9/XXVIII/CRP.7, there had been a suggestion that the words "at any time" in the chapeau be deleted and another proposal that the paragraph be amended to read "Paragraph (5) shall not apply when the addressee knew that there were any errors in the process of transmission immediately after receipt of the data message".

2. **Mr. ALLEN** (United Kingdom) said that the representatives of Australia and the United States of America had joined him in trying to find a form of words that would obviate the need for the phrase "at any time", about which certain representatives had expressed concern. The purpose of the paragraph was to make clear that the addressee could rely on the data message up to the time of notification or knowledge, but not thereafter. They proposed the following text for paragraph (6): "The addressee is not so entitled when it knows or should know, by exercising reasonable care or using any agreed procedure, that the transmission resulted in any error in the content of the data message as received". That wording was intended to replace the whole of the existing paragraph (6). Similar amendments would be needed to paragraphs (4) (b) and (7). For paragraph (4) (b) he suggested the following wording: "In a case within paragraph (3) (a) (ii) or (3) (b), when the addressee knows or should know, by exercising reasonable care or using any agreed procedure, that the data message is not that of the originator". A corresponding formulation would be needed for paragraph (7).

3. **The CHAIRMAN** asked what the words "not so entitled" referred to in the new wording for paragraph (6).

4. **Mr. BONELL** (Italy) said that the new text, which his delegation had helped to prepare, was intended to form a second sentence of paragraph (5) rather than a separate paragraph.

5. **Mr. CHOUKRI SBAI** (Observer for Morocco) observed, firstly, that the former wording of paragraph (6) provided that "paragraph (5) shall not apply ...", a reference that had been deleted in the new text. He asked whether it was intended to eliminate paragraph (5). Secondly, paragraph (6) (a) raised an important point regarding notification by the originator of an error in transmission, a point which appeared to be absent from the new text.

6. **Mr. RENGER** (Germany) noted that the United Kingdom's amendment to paragraph (4) (b) referred to paragraph (3) (a) (ii). However, it was his impression that no decision had yet been taken in regard to paragraph (3) (a) (ii).

7. **The CHAIRMAN** said that it had been decided at the previous meeting to retain paragraph (3) (a) (ii) because there had not been enough support for its deletion.

8. **Mr. RENGER** (Germany) said that that had not been his understanding. There had been a split in opinion, and it had been his understanding that the final decision in regard to paragraph (3) (a) (ii) had been deferred. He agreed with the observations made on the subject by the representative of the United States. The paragraph in question was the most revolutionary in the entire Model Law and needed to be further discussed. His country was deeply concerned about the paragraph, which had nothing to do with EDI and modified the basic principles of German contract law.

9. **The CHAIRMAN** said that, although his own notes showed that a decision had in fact been taken on paragraph (3) (a) (ii), it would be possible, after consideration of article 11 and the definitions in article 2, to reconsider the decision in respect of paragraph (3) (a) (ii).

10. **Mr. BONELL** (Italy) said that he had understood that it would be possible to reverse the decision on paragraph (3) (a) (ii) in the light of any new decision regarding the scope of the Model Law. It would therefore be necessary to return to that subparagraph after "data message" had been defined in article 2. As far as the suggested amendments to paragraphs (4) (b), (5), (6) and (7) were concerned, the new language was not intended as a substantive change. The new wording for paragraphs (5) and (7) was simply to bring them more into line with paragraph (4) (b). Paragraph (5) would have two sentences instead of only one as at present and paragraph (6) would disappear. The reference to notification by the originator would be deleted, firstly, because there was no reason why the originator should be able to give such notification "at any time", when paragraph (4) was much more restrictive, and secondly, because it was preferable to adopt uniform criteria for the three situations covered by paragraphs (4) (b), (5) and (7), in conformity with the Convention on the International Sale of Goods and certain other instruments that dealt with problems such as errors in transmission.

11. **Mr. BURMAN** (United States of America) agreed with the representative of Italy that the same approach should be taken in the three provisions. He would not want the text to inadvertently give the impression that a difference in treatment was intended.

12. **Mr. ALLEN** (United Kingdom) proposed the following text for paragraph (7): "The addressee may regard each data message received as a separate data message and may act on that assumption unless it repeats the content of another data message and the addressee knows or should know, by exercising reasonable care or using any agreed procedure, that the repetition was a duplication, and not the transmission of a separate data message."

13. **Mr. PELICHET** (Observer for The Hague Conference on Private International Law), referring to article 11, paragraph (8), in document A/CN.9/XXVIII/CRP.7, said that the last five words of that paragraph, "and any other applicable law", caused a major problem for his organization. The Model Law would apply when in a conflict of law the ruling of the judge designated a State that had incorporated the Law into its national system. But that system would then be fully applicable. There could be no question of "other applicable laws". In his view, the last five words should be deleted. Indeed, he thought that paragraph (8) as a whole was superfluous.

14. **Mr. BONELL** (Italy) agreed with the previous speaker. There were other potential problems. If, for example, a State were to make use of the second footnote at the very beginning of the Model Law and limit its application to data messages relating to international commerce, the question might arise as to what law was applicable and whether States might not wish to include special conflict-of-law rules, one of which might be implicitly envisaged in paragraph (8). If the Commission wished to explore that question, it should perhaps do so in a footnote. Attention would then also have to be paid to article 3, paragraph (2), which requested judges and arbitrators to try to solve problems not settled by the Model Law itself by applying the general principles on which it was based before resorting to another law in the same legal system or to a foreign law. That was a complicated area which, in his view, the Commission should not enter. It would be preferable to delete paragraph (8) altogether.

15. **Mr. ABASCAL ZAMORA** (Mexico), referring to the policy position underlying paragraph (8), said that when the Model Law had been drafted, it had been decided to produce a law that would be limited to regulating data messages and associated problems. It had subsequently been realized that the Model Law would need a provision setting out the conditions under which a data message could be considered as issued by the originator so that the addressee would be able to consider it as having the value of a signed document. The Model Law did not deal with the legal effect that such a message might have in the context of the law of obligations and contracts. It was possible that it might be necessary to adjust the wording in order to bring out the original intention and avoid unwanted interpretations.

16. **Mr. BURMAN** (United States of America) agreed with the representative of Mexico as to the reasons for the inclusion of paragraph (8). He did not consider any further amendments necessary and disagreed with the representative of Italy and the observer for the Hague Conference, who were raising problems of conflict of law with which the Law was not directly concerned. He saw no inconsistency with article 3 or with the second footnote. Paragraph (8) served its purpose and was appropriate.

17. **Mr. CHOUKRI SBAI** (Observer for Morocco) endorsed the point made by the observer for the Hague Conference. He proposed that paragraph (8) should be reworded as follows: "Any further legal effect of the data message shall be determined in accordance with the provisions of this Law and any other general rule or standard".

18. **Mr. VRELLIS** (Observer for Greece) also supported the point made by the observer for the Hague Conference. Paragraph (8) solved no problems, was hard to interpret and could be deleted without difficulty. Moreover, it would be difficult to deal with the question of conflict of law at the present stage of the Commission's deliberations, even in a footnote, since it was a difficult subject and would involve lengthy discussion.

19. **Mr. RENGER** (Germany) asked whether the words "may regard" in the text proposed by the United Kingdom representative for paragraph (7) could be interpreted as meaning that the addressee had a choice.

20. **Mr. ALLEN** (United Kingdom) explained that the meaning was that "the addressee is entitled to regard", and suggested that that wording should be adopted.

21. **Mr. SORIEUL** (Secretariat) explained that paragraph (8) had been included merely to reaffirm that the purpose of the Model Law was to deal with the transmission of information in the form of a data message, and not with the substance of a contract or order contained in that message, which might be covered by contract law or other provisions of commercial law.

22. **Mr. ALLEN** (United Kingdom) agreed with the observer for the Hague Conference and the representative of Italy that paragraph (8) could be deleted. It was unnecessary and confusing, since it implied that article 11 was intended to deal with the legal effect of a data message, whereas it was not. The data message might have no legal effect at all and might simply be an enquiry about goods. The sole purpose of article 11 was to decide the circumstances in which a message was directed to the originator and the circumstances in which the addressee could safely rely on that assumption.

23. **Mr. SHIMIZU** (Japan) agreed that paragraph (8) had been included to make it clear that article 11 was not intended to interfere with the laws of contract or agency. However, his impression was that the text adopted the previous day had the effect of doing so when it applied to the contractual relationship between originator and addressee. It might be helpful to make it clear in the Guide that although article 11 was not intended to interfere with the law of agency or the law of contract, it might have such an effect in certain jurisdictions.

24. **Mr. MADRID** (Spain) said that article 11 was solely concerned with establishing the fact of a link between the originator of a message and the addressee. It did not deal with the legal consequences of any message that might pass between them. That would be determined by the relevant legal system. His delegation was therefore in favour of maintaining paragraph (8) to make that point clear, but of redrafting it to avoid any erroneous interpretation that it might be concerned with a conflict of law. In that connection, he drew attention to paragraph 131 of document A/CN.9/406, which recorded the discussion in the Working Group that had led to the adoption of the paragraph.

25. **Ms. ZHANG Yuejiao** (China) endorsed the explanations given by the Secretariat and considered that articles 3 and 11 should be maintained. To ensure uniform implementation of the Model Law, the Guide should contain an explanation of article 3 (2) and of the words "any other applicable law" in article 11 (8).

26. **Mr. CAPRIOLI** (France) was in favour either of deleting article 11 (8) altogether or of deleting from it the words "any other applicable law".

27. **Mr. BONELL** (Italy) said he was grateful for the explanation of the rationale behind article 11 (8), but considered that it had not been conveyed in the wording. According to paragraph 131 of document A/CN.9/406, the Working Group had approved and referred to the drafting group language along the following lines: "Once a data record is deemed or presumed to be that of the originator, any further legal effect will be determined by this law and other appropriate laws". That was a much clearer formulation.

28. If it was quite certain that the Model Law did not affect general rules of agency and contract law, he suggested that that should be made clear at the outset in the following terms: "Nothing in this Law shall affect ...".

29. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) considered that the last phrase of paragraph (8) was ambiguous and that the rest of the paragraph repeated the provisions of article 3 (2). It should be deleted.

30. **Mr. MAHASARANOND** (Thailand) agreed that paragraph (8) should be deleted, because it caused confusion. In any case, legal recognition of data messages was already dealt with in article 4.

31. **Mr. ALLEN** (United Kingdom) said that his delegation would prefer to delete paragraph (8) altogether, but if the Commission did wish to maintain it, he suggested that it should be redrafted as follows: "This article does not determine whether the data message has any legal effect, except in so far as may result from the attribution of the data message to the originator"

32. **Mr. BURMAN** (United States of America) considered that either that wording or the original formulation agreed by the Working Group would accomplish the same result.

33. **Mr. BOSSA** (Uganda) said that paragraph (8), which seemed to be trying to relate the Model Law to domestic law, should either be deleted or transferred to article 1.

34. **Mr. SZURSKI** (Poland) was in favour of deleting paragraph (8).

35. **Mr. RENGER** (Germany) also wished to delete paragraph (8) and considered that rules of international interpretation should be included in the Guide, not in the Law itself.

36. **Mr. CHOUKRI SBAI** (Observer for Morocco) said he could not support the wording just suggested by the United Kingdom and would prefer to delete paragraph (8).

37. **Mr. ABASCAL ZAMORA** (Mexico) said that although he had tried to explain why paragraph (8) had been adopted by the Working Group, he too would have no problems in deleting it.

38. **Mr. UCHIDA** (Japan) was in favour of deleting paragraph (8), in order to avoid any confusion.

39. **Mr. BURMAN** (United States of America) said that his delegation too had no objection to deleting the paragraph.

40. **Mr. BONELL** (Italy) said that, even if paragraph (8) was deleted, article 11 could still contain a provision on the lines of the earlier draft text.

41. **Mr. VRELLIS** (Observer for Greece) said that other effects of the data message not specifically provided for could also be governed by the Model Law.

42. **Mr. ABASCAL ZAMORA** (Mexico) said that two further aspects that might be of relevance were contained in articles 12 and 13 and involved the expression of intent by electronic means.

43. **The CHAIRMAN**, summing up the debate, said that there appeared to be general agreement that the new paragraph (8) should be neither retained nor replaced.

44. *It was so decided.*

45. **The CHAIRMAN** invited the Commission to return to its consideration of the proposed revised wording to replace paragraphs (5), (6) and (7), the text of which was as follows:

"(5) (a) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption.

"(b) The addressee is not so entitled when it knows or should know by exercising reasonable care or using any agreed procedure that the transmission resulted in any error in the content of the data message as received.

"(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption unless it repeats the content of another data message and the addressee knows or should know by exercising reasonable care or using any agreed procedure that the repetition was a duplication and not the transmission of a separate data message."

46. **Ms. ZHANG Yuejiao** (China) said that the replacement of "knew" and "should have known" by "knows" and "should know" in paragraph (5) (b) could imply that the addressee might act on the assumption that the data message was that of the originator before becoming aware of an error or duplication and would then be solely responsible. That would not be fair.

47. **Mr. ALLEN** (United Kingdom) said that the use of the present tense in the revised wording was intended to make it clear that the addressee was entitled to rely on the data message until it became known to him that the message was not that of the originator, but not once he had such knowledge.

48. **Mr. SZURSKI** (Poland) said that he questioned the need for new paragraph (6), which defined what was regarded as a separate message. If such a provision was necessary, it would be better to say that the addressee was entitled to regard a duplication of a data message as a separate message.

49. **Mr. SHIMIZU** (Japan) noted that the words "as between the originator and the addressee" in paragraph (5) of the text in document A/CN.9/XXVIII/CRP.7 did not appear in paragraph (6) of the revised text. Did that have any significance?

50. **Mr. CHAY** (Singapore) wondered whether the time element in paragraph (5) (b) could be expressed more clearly by replacing the words "The addressee is not so entitled" by "The addressee shall cease to be so entitled".

51. **Mr. RENGER** (Germany) said that his delegation could go along with new paragraph (5) if paragraph (3) (a) (ii) was deleted.

52. **The CHAIRMAN** said that he took it that the Commission wished to adopt the revised text of paragraph (5) on the understanding that it would re-examine paragraph (3) (a) at a later stage.

53. *It was so decided.*

54. **Mr. RENGER** (Germany), referring to new paragraph (6), said that, whereas the text as previously drafted had constituted a rule of evidence and provided for a presumption on the part of the addressee, the revised text gave a right to the addressee. He would like to know the reason for such a major change of policy. In new paragraph (6) it would be preferable to say that the addressee "has to regard" each data message received as a separate data message.

55. **Mr. ALLEN** (United Kingdom) said that the phrase "is entitled to regard" had been used in new paragraph (6) for reasons of consistency with the rest of article 11. The revised text of the article attempted to reflect the Working Group's intention of delimiting the extent of the protection afforded to the addressee rather than enact an evidential presumption. At the time of drafting of the earlier text, the question whether the presumption should be rebuttable or not had not been settled, the word "deemed" having been left in square brackets. If it was a rebuttable presumption and the presumption was rebutted, the addressee would no longer have protection and would be exposed to claims from the originator as from receipt of the message, and even before the addressee had had knowledge that the message was not that of the originator. In the case of a non-rebuttable presumption, the addressee would be afforded protection for all time, and even after having had such knowledge. The Working Group's intention was that protection should cease upon such knowledge being acquired, and the revised wording thus provided for such a cut-off point.

56. **Mr. MADRID** (Spain) said that, as he understood it, paragraph (3) (a) (i) had been adopted in the belief that it provided for a presumption and not a right, since the message was assumed to be that of the originator and the addressee had applied a previously agreed procedure. If, however, as had been explained by the representative of the United Kingdom, the phrase "is entitled to regard" in paragraph (6) had been employed for reasons of uniformity of language between paragraphs, that same phrase should not appear in paragraph (3), whose substance was different.

57. **Mr. SZURSKI** (Poland) said that his delegation felt that new paragraph (6) should be deleted, since it could give rise to complications. Indeed, it would be possible in practice for a second message to be a duplication even if one word of its content had changed. In his view, the determination of such matters should not come within the purview of the Model Law.

58. **Mr. BURMAN** (United States of America) said that he believed that the Working Group had agreed that, since the purpose of the Model Law was to facilitate electronic commerce through the use of new technologies, its provisions should deal with some of the common problems encountered in that environment, and hence with the question of erroneous duplication of messages, in order to provide guidance for users.

59. **Mr. SORIEUL** (Secretariat), replying to the issue raised by the representative of Poland, said that the question of duplication did in fact arise in practice. The Working Group had agreed that the issue should be dealt with, but had never felt that the application of a procedure for avoiding the duplication of messages in any way affected the content of the message. The procedures usually applied enabled a distinction to be made between the case when the repetition of a message was simply the result of error and should therefore be considered as null, and the case when there was in fact a second message.

60. **Mr. AL-NASSER** (Saudi Arabia) suggested that paragraph (6) might read: "When the addressee receives a data message, it is entitled to act on the assumption that it is a separate data message, unless the message repeats the content of an earlier data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplication of an earlier data message."

61. **Mr. GRIFFITH** (Australia) proposed referring to "erroneous" duplication, as had been done in paragraph (4) of article 11 in the report of the Working Group (A/CN.9/406).

62. **Mr. RENGER** (Germany) said that he doubted whether the rule was convincing. He cited an example: when a bank received a payment order followed by a duplicate for the same amount and payee, if paragraph (6) were applied, so that the addressee was entitled to regard each data message as a separate payment order, the payee would receive payment twice. He wondered whether it was really a good policy to allow banks the possibility of making the second payment in such cases. As a rule of evidence, the original text had already been a compromise, because if there was duplication, the result should not be a rule of evidence; instead, the addressee should be entitled to damages if the duplicate message caused it damage. The Working Group's proposal had been not to regard the second erroneous message as a separate one — which would mean, in his example, that while nothing could be done if the duplicate payment order had been fulfilled, if it had not, there would be no damage because it could be stopped. What the new paragraph (6) proposed was not a rule of evidence, but a rule of substance, and as such it was not convincing. The policy of the rule should be that where there was duplication of a message, the addressee would be entitled to damages caused by such duplication, and that policy was very different from what had been discussed hitherto.

63. **Mr. ABASCAL ZAMORA** (Mexico) said that paragraph (7) in document A/CN.9/XXVIII/CRP.7 did not differ in substance from the Working Group's proposals. Paragraph (4) of article 11 as submitted to the Commission also referred to the detection of duplicates. The same issue had arisen in the Model Law on International Credit Transfers, where the problem of verifying whether the message came from the originator had been resolved. As a separate matter, it had been deemed necessary in article 5 of that Model Law to establish a procedure for verifying the contents of the message, in which duplication was a frequently encountered error.

64. The proposal for a redrafted article 11 was intended to identify more clearly those two issues, the substance of which could be combined. If there was an error, and if the addressee was able to detect it through procedures of verification, then the addressee was not entitled to act on the message in question.

65. **Mr. MADRID** (Spain) asked how an erroneous duplication could be detected. That could never be done solely on the basis of the contents of the message, because there might be a case of two identical orders that were both genuine. Perhaps it was the identification of the message and not the contents, which should be stressed.

66. **Mr. ALLEN** (United Kingdom) agreed with the representative of Germany that the question at issue was one of policy, not of drafting. The text embodied the policy of the Working Group, but the Commission could still change that policy. The issue was where the risk should be allocated when two identical messages were sent — who should properly incur the loss. The Commission was not at present discussing cases where there was doubt as to the source of the message, which was dealt with quite separately, but, rather, cases of duplication where both data messages were known to be those of the originator, or where the addressee was entitled to assume they were. In such instances, the addressee might incur a loss, by virtue of the fact that two messages in identical form had been sent. The addressee might, for example, act on an order for goods and dispatch them to a third party, and if the originator was then entitled to resile from the second order, the addressee would incur a loss.

(*Mr. Allen, United Kingdom*)

67. Given that both messages came from the originator, it was in the originator's power to set the matter right, which was why the draft gave the protection to the addressee that it did. If two messages were sent, it was up to the originator to alert the addressee to the fact that the second message should not be relied upon. Unless the originator did so, the addressee should be entitled to rely on the second message unless it had failed to use an agreed procedure or had been negligent in assuming that the second message was not a mere duplication. The Commission should not be concerned only with erroneous messages, since a second message might be sent in the belief that the first had not been received. The Commission ought to consider the position of the addressee in those circumstances as well: should it be allowed to rely on the second message, or should it have no protection when it received a second message which appeared to be identical to the first?

68. **Mr. RENGER** (Germany) said that the first problem was where the risk should be allocated; the risk of an erroneous duplication lay with the originator. The second problem was what the consequences should be. One option would be to say that the addressee might be allowed to profit from others' errors — for example, to fulfil the second payment order or enter into a second sales contract. As far as credit transfers were concerned, there was the possibility of a revocation. In some legal systems, the originator could revoke a payment order; discussion was at present under way in the European Union as to whether revocation should be excluded or not. The risks should lie with the originator, but only in limited circumstances: it should only pay damages, and the addressee should not make a profit from the situation. As now drafted, the rule left the matter up to the addressee, which was entitled to regard each data message as a separate one. That was not fair, as it was biased in favour of the addressee. For that reason, he opposed the new text.

69. **Mr. BONELL** (Italy) asked whether the representative of Germany considered there was a difference in substance between a so-called duplicate situation and a message which was erroneous in content. The Working Group had gone on the assumption that the two situations should be treated in the same manner; paragraph (4) of article 11 addressed them both. He wondered why the representative of Germany was raising the problem of duplication with respect to new paragraph (6) and had not felt it necessary to do so with respect to paragraph (5).

70. **Mr. ABASCAL ZAMORA** (Mexico) said that the Model Law on International Credit Transfers, unlike the present Model Law, regulated the rights and obligations of the parties with respect to payment orders. It had been established as a general rule in the earlier Model Law that such orders were irrevocable unless revocation was received in sufficient time to be able to act on it. In paragraph 130 of its report, the Working Group had considered whether a similar provision should appear in the present Model Law with respect to revocation of erroneously duplicated messages. The Group had felt that the originator of a duplicate message had the opportunity of sending a separate message to revoke the erroneous message, but that it was not necessary to say so.

71. **Mr. RENGER** (Germany) said that that situation needed to be dealt with, as it caused major problems in banking practice and in industry, with banks frequently receiving erroneous duplicate payment orders. As far as the error in content was concerned, in his country it would be dealt with in domestic law, through the general rule of contracts. There were rules on error which could be applied, or the problem could be easily solved by applying additional rules of error, but such additional rules could not really apply to the second situation of duplication. That was why his delegation was concerned, from its domestic point of view, with the duplication problem. It was a general principle of law in various legal systems that an addressee should

(*Mr. Renger, Germany*)

never profit from errors made by the originator or other parties; on the other hand, if damage was caused, the addressee should be entitled to damages.

72. **Mr. BURMAN** (United States of America) said that his delegation continued to support the explanation given by the United Kingdom concerning the proposed language. He was uncomfortable with references to banking law and electronic fund transfers, which were dealt with in the Model Law on International Credit Transfers, because the particular area of EDI use in banking was highly regulated, with a very high degree of assurance owing to reliability of security systems, and it represented a quite different model from general commercial uses. Accordingly, the Commission should focus on examples that occurred in other sectors of commerce.

73. **Mr. GRIFFITH** (Australia) said that he agreed there was an underlying issue of policy with regard to paragraph (4) of article 11. It was fairly clear that the policy which had been accepted by the Working Group was that the addressee should not be permitted to rely on plainly erroneous information where there was a plainly erroneous duplication. It was a matter of wording; perhaps the original wording of paragraph (4) should be retained.

The meeting rose at 12.30 p.m.